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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Michele A. Olsen

Serial No. 76169360

Lynn A. Sullivan and Seth A. Rose of Leydig, Voit & Mayer,
Ltd. For Michele A. Olsen.

Elizabeth A. Hughitt, Trademark Examining Attorney, Law
Office 111 (Craig D. Taylor, Managing Attorney).

Before Simms, Seeherman and Bottorff, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Michele A. Olsen has appealed from the final refusal
of the Trademark Examining Attorney to register ENERGY
ARCHITECTURE CREATING ENVIRONMENTS TO EMPOWER PEOPLE for
"architectural design services for business and consumers,
namely preparation and analysis of interior and exterior

designs of space using energy point information."¹

Applicant has disclaimed exclusive rights to the word ARCHITECTURE apart from the mark. However, the Examining Attorney has made final a requirement that applicant disclaim not just the word ARCHITECTURE, but the phrase ENERGY ARCHITECTURE, and because applicant has not complied with that requirement, the Examining Attorney has refused registration.

Applicant and the Examining Attorney have filed briefs; applicant did not request an oral hearing.

Section 6(a) of the Trademark Act, 15 U.S.C. 1056(a), provides, in part, that the Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable. Section 2(e)(1), 15 U.S.C. 1052(e)(1), prohibits the registration of a mark which, when used on or in connection with the goods of the applicant, is merely descriptive of them. Section 3, 15 U.S.C. 1053), makes these provisions applicable to the registration of service marks.

A mark is merely descriptive, and therefore unregistrable under Section 2(e)(1), if it forthwith conveys information concerning any significant ingredient,

¹ Application Serial No. 76169360, filed November 22, 2000, and asserting a bona fide intention to use the mark in commerce.

quality, characteristic, feature, function, purpose, subject matter or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used or is intended to be used on or in connection with those goods or services and the significance that the term would have to the average purchaser of the goods or services because of the manner of such use. See *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

Applicant has acknowledged that she "offers architectural design services that utilize the discipline of feng shui," brief, p. 8, and that feng shui is "the heart of Applicant's services." Brief, p. 3. It is the Examining Attorney's position that the word ENERGY is merely descriptive of applicant's services because "energy" is the primary characteristic of feng shui architecture. In support of this position, she points to the fact that applicant's own identification of services, "architectural design services for business and consumers, namely preparation and analysis of interior and exterior designs

of space using energy point information," describes "energy point information" as a central feature of the services. The Examining Attorney has also made of record numerous articles and excerpts taken from the NEXIS data base and from the Internet, including the following:

Feng shui (pronounced "fung schway") instructs that buildings should be designed in harmony with nature. Feng shui practitioners believe that a building's architecture, location, and interior design should be carefully planned to produce a balanced flow of cosmic energy, or ch'i (pronounced "chee").

"The Boston Globe," February 24, 2002

...feng shui, the 6,000-year-old Chinese art of arranging the environment to maximize positive energy.

"Pittsburgh Post-Gazette," August 17, 2002

While the chic believe that Feng Shui is moving furniture around to make your living area appear bigger, the more traditional definition of the ancient art is "maximizing positive energy through architecture."

"The Boston Herald," June 2, 2001

Bernie Berenson, a graduate of the Feng Shui Institute of America, will teach the techniques of placement in architecture, interior design and common sense. She will explain the five basic elements of feng shui, the importance of balance and the need to create ways for energy to flow through your home or garden.

"The Tennessean," April 17, 2002

Graphic: PHOTOS...FENG SHUI AT WORK: in the new offices of Yoshino Architects in Boca Raton, designed according to feng shui principles, a bell designed by world-renowned visionary architect Paolo Soleri is placed by the front door to optimize energy and productivity.
"Sun-Sentinel" (Fort Lauderdale),
January 7, 2002

Take feng shui. A friend of mine, an architect, went to Hong Kong recently to take feng shui lessons. Why? Since many of his clients believe in this art of geomancy, he has to seriously study the chi, the flow of cosmic energy as perceived by Taoist priests, in order to build suburban houses that suit many of his buyers.
"Los Angeles Times," August 26, 2001

Bender's architecture subscribes to a very different aesthetic, based in feng shui and other Eastern theories. Even a short conversation with him leads quickly to holistic notions of "chi" energy and "architecture as "healing."
"The Oregonian," August 15, 2001

The couple, who based the design [of their home] on a house they had lived in briefly in Wales, hired a feng shui master to "ensure the balance of energy was right" before getting the architect to draw the plans."
"Dayton Daily News," June 22, 2001

Ms. Burnett, who is certified in feng shui, says the ancient Chinese study of energy and architecture is growing in popularity as well, and that contributes to homeowners' interest in water.
"The Washington Times," June 13, 2001

Wonder what feng shui is? Based on a belief in patterns of yin and yang found in Chinese dualistic philosophy, it's the 4000-year-old practice of specifically positioning objects—graves, buildings, furniture—to positively affect the life flow of energy (chi or qi) in one's surroundings, thereby promoting health, wealth, and happiness.

"Miami New Times," April 5, 2001

Designed by a Yale-trained architect who is a master in feng shui (the ancient Chinese art of arranging a room to direct and harness its energy), it is an element, yet warm mixture....

"Newsday," (New York), June 27, 2000

Using the ancient Chinese science feng shui, Pildis says, she can help clients open the flow of energy, or chi, by taking away, adding and moving things in a room. The feng shui principles of design, ecology, architecture and mysticism, she says, create a peaceful atmosphere.

"The Hartford Courant," June 19, 2000

We have no doubt that the word ENERGY, and the phrase ENERGY ARCHITECTURE, would immediately convey to consumers of applicant's architectural design services of preparation and analysis of interior and exterior designs of space using energy point information, information about a significant characteristic of those services, namely, that the architectural services use information about energy. Further, because applicant's architectural services are based on the principles of feng shui, and energy flow is a

major feature of that practice, consumers who view applicant's mark in the context of her services will immediately understand the descriptive significance of the words ENERGY ARCHITECTURE.

Applicant has argued that ENERGY ARCHITECTURE is suggestive because it has multiple possible connotations to the average purchaser of architectural design services. Much of this argument is based on the fact that the Examining Attorney who originally examined applicant's application took the position that "energy architecture" is a term various companies use "to describe a type of alternative architecture style used in many buildings and structures to improve energy efficiency." September 26, 2002 Office action.² It appears to us that the prior Examining Attorney took a very formulaic approach to the question of descriptiveness, and merely submitted excerpts from the NEXIS data base in which the terms "energy" and

² The application was assigned to the present Examining Attorney after applicant filed her appeal brief and this Examining Attorney determined that the proper reason for requiring the disclaimer was not that "energy architecture" was a type of architecture, but that it was descriptive of architecture using principles of feng shui. Therefore, she requested that the application be remanded to her so that she could submit evidence supporting this reasoning. In accordance with Board policy that such requests be granted when an application is assigned to a new attorney, the application was remanded to the Examining Attorney. Applicant subsequently filed a supplemental brief addressing the new arguments and evidence and, as allowed in the Board order, submitted responsive evidence.

"architecture" appeared within a few words of each other, without regard to the meaning of the sentence. Thus, most of the excerpts refer not to "energy architecture", but to "low energy architecture" or "alternative energy architecture."³ We do not regard the evidence or arguments of the prior Examining Attorney as persuasive that "energy architecture" is an alternative for the terms "low-energy architecture" or "alternative energy architecture" and, more importantly, we do not think the relevant consuming public would regard "energy architecture" as having such a meaning. Thus, we do not find that "energy architecture" has multiple meanings when used in connection with applicant's feng shui-based architectural design services of preparing and analyzing interior and exterior designs of space using energy point information.

Applicant also argues that energy is not the key feature of feng shui, noting that the Merriam-Webster OnLine Dictionary definition of "feng shui" does not refer to the word or the concept of energy: "a Chinese geomantic practice in which a structure or site is chosen or configured so as to harmonize with the spiritual forces

³ The Examining Attorney even submitted articles in which "energy" is used in an artistic sense, e.g., "beauty is the binding energy of architecture."

that inhabit it; also: auspicious orientation, placement, or arrangement as determined by feng shui." Although "energy" is not specifically mentioned in this definition, it is clear from the evidence submitted by the Examining Attorney that the purpose of feng shui is to place buildings and objects within those buildings with a focus on spiritual energy. More importantly, the evidence establishes that in the minds of the consuming public, energy is a central concept of feng shui.

Applicant also asserts that even if the separate elements ENERGY and ARCHITECTURE "can separately be defined as having something to do with the nature of the Applicant's services," supp. brief, p. 5, the combination ENERGY ARCHITECTURE is not descriptive. However, we do not find that the term ENERGY ARCHITECTURE creates a new meaning in which the descriptiveness of the individual words is lost, in the manner of SUGAR & SPICE for bakery products, which conveys not only that the bakery products contain these ingredients, but also evokes the nursery rhyme. See *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968). In the context of the applicant's services, consumers would recognize only the meaning that applicant provides architecture services with respect to energy point information.

Finally, applicant contends that there is no evidence of any third-party registrations in which the term "energy architecture" appears in the identification of goods and services, nor are there any registrations in which ENERGY ARCHITECTURE is disclaimed. With respect to the former point, there is no indication as to how many, if any, third-party registrations there are for specialized services of the type offered by applicant, and therefore the fact that applicant was unable to find the term "energy architecture" listed in an identification of goods is not particularly probative. As for applicant's second point, because merely descriptive terms are not registrable, the fact that businesses have not adopted an unregistrable element as part of their marks is not persuasive that such an element is not merely descriptive. We note that applicant is not contending that marks that include the words ENERGY ARCHITECTURE have been registered without a disclaimer.

Decision: The requirement for a disclaimer of ENERGY ARCHITECTURE is affirmed. However, if applicant submits the required disclaimer within thirty days, the application will proceed to publication.